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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 26

MARTHA A. HORNBEAK, for herself and all others similarly situated,
Appellant,

vs.

PHILLIP HAMM, Commissioner of Revenue for the State of Alabama, and his successors in office,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

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Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

Appellant, in conformity with Supreme Court Rules 13(2) and 15 hereby files her statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction of a direct appeal to review the final judgment in the present case, and the reasons for which the Supreme Court should exercise such jurisdiction in this matter.

OPINION BELOW

The United States District Court for the Middle District of Alabama entered a written opinion dismissing this case. This opinion is not presently reported. The majority opinion and the dissenting opinion are appended to this jurisdictional statement.

NATURE OF PROCEEDING

Appellant instituted this suit in an effort to acquire uniform assessment of property throughout the State of Alabama for ad valorem tax purposes. Appellant alleged a cause of action under 42 U. S. C. A., Sections 1983 and 1988, alleging the lack of uniformity of valuation and assessment of property was depriving her and others similarly situated of property without due process of law and constituted a denial of equal protection of the laws, in violation of the *Fourteenth Amendment to the Constitution of the United States of America*. Appellant claimed jurisdiction under 28 U. S. C. A., Section 1343(3). Appellant's complaint alleged that Act No. 502 of the Regular Session of the Alabama Legislature of 1967 was unconstitutional and thereby void.

JUDGMENT SOUGHT TO BE REVIEWED

The judgment in this cause was entered on the 10th day of April, 1968. Appellant filed Notice of Appeal in the United States District Court for the Middle District of Alabama on May 8, 1968.

STATUTORY PROVISION CONFERRING JURISDICTION OF THIS APPEAL

The United States Supreme Court has jurisdiction to review by direct appeal the judgment complained of in this case by virtue of the provisions of 28 U. S. C. A. 1253 and 28 U. S. C. A. 2101(b)

CASES BELIEVED TO SUSTAIN JURISDICTION

It appears well settled by cases that a direct appeal to the United States Supreme Court is the proper and only appellate remedy from any decision of a three-judge District Court properly convened pursuant to 28 U. S. C. A. 2281. Such cases include:

Florida Lime and Avocado Growers, Inc. v. *Jacobsen*, 362 U. S. 73.

Brotherhood of Locomotive Engineers v. *Chicago, R. I. & P. R. Company*, 382 U. S. 423.

St. John v. *Wisconsin Employment Relations Board*, 340 U. S. 411

ALABAMA STATUTE ASSERTED INVALID

Appellant's Complaint alleged that Act No. 502, *Acts of Alabama 1967*, was vague, indefinite and uncertain and in violation of Section 211, *Constitution of Alabama 1901* and the *Fourteenth Amendment to the Constitution of the United States of America*. That statute reads as follows:

"Section 1. All taxable property within this State shall be assessed for the purpose of taxation not to exceed 30 percent of its fair and reasonable market value.

Section 2. *Code of Alabama*, Title 51, Section 17, which conflicts with this Act, and all other laws or parts of laws in conflict herewith are hereby repealed.

Section 3. This Act shall take effect October 1, 1967."

QUESTIONS PRESENTED BY THIS APPEAL

1. Do the United States District Courts have original jurisdiction under Title 28 U. S. C. A. 1343(3), of civil actions authorized by law brought for the purpose of preventing the deprivation without due process of law under

color of State statute of property of a citizen of the United States?

2. Do the terms of Title 28 U. S. C. A. 1343(3), create any distinction between a "property or monetary right" secured by the *Constitution of the United States of America* and a "civil right" secured by the *Constitution of the United States of America?*

3. Do the United States District Courts have original jurisdiction of a civil action pursuant to Title 28 U. S. C. A., Section 1343(3), brought for the purpose of preventing the deprivation of property of a citizen pursuant to State custom without due process of law?

STATEMENT OF THE CASE

This action was brought by the Appellant for herself and for all other citizens similarly situated against the Commissioner of Revenue of the State of Alabama and his successors in office.

Appellant alleged a cause of action under 42 U. S. C. A. 1983 and 1988 and asserted original jurisdiction of the United States District Court by virtue of 28 U. S. C. A., Section 1343(3).

Appellant alleged as fact that she is the owner of real property within the State of Alabama assessed for purposes of ad valorem taxation at 30 percent of its fair and reasonable market value, that other real property within the State of Alabama is assessed at various percentages of its fair and reasonable market value for purposes of ad valorem taxation and that the average assessment of real property for purposes of taxation is 15.4 percent of fair and reasonable market value.

Appellant further alleged that the Commissioner of Revenue for the State of Alabama and his predecessors in office have for many years failed, refused or neglected to perform the statutory duties of that office to maintain equality of assessment of real property within the State of Alabama for the purpose of levying ad valorem taxes. Appellant's Complaint asserted that these duties of the Commissioner of Revenue are set out in Sections 131 and 133 of Title 51, *Code of Alabama* (1940). These sections are lengthy, and true copies of them are appended to this Jurisdictional Statement.

Appellant further alleged that Act No. 502, *Acts of Alabama 1967*, is invalid and so vague as to be constitutionally inadequate. The text of this Act has heretofore been set out.

Appellant's Complaint further alleged that she and other citizens and taxpayers similarly situated were without a plain, speedy and efficient remedy in the state courts of Alabama because said courts had declared that the duties of the Appellee were owed to the sovereign State of Alabama and that a mere citizen and taxpayer did not have standing to require the performance of statutory duties of the Appellee. Such cases as alleged by the Appellant in her Complaint are:

State ex rel. Chilton County v. *Butler as State Tax Commissioner*, 225 Ala. 191, 142 So. 531 (1932).

State ex rel. Foshee v. *Butler as State Tax Commissioner*, 225 Ala. 194, 142 So. 533 (1932).

Morrison v. *Morris as Chairman, Board of Equalization*, 273 Ala. 390, 141 So. 2d 169 (1962).

Appellant also alleged that a predecessor of the Appellee, Mr. Harry Haden, serving as Commissioner of Revenue on April 7, 1959 issued Department of Revenue Regulation No. 2 that read in pertinent part as follows:

> ". . . It is the decision of the Department of Revenue that the percentage that must be used by all tax officials as of this date is 30 percent of the fair and reasonable market value."

Upon the announcement of said Regulation No. 2, the Legislature of the State of Alabama immediately threatened to repeal the authority given the Department of Revenue in Sections 131 and 133 of Title 51, *Code of Alabama* (1940), in its entirety by the introduction of several legislative proposals commonly known as "Anti-Haden Bills". Appellant alleged that said Regulation No. 2 was never put into effect.

Appellant's Complaint prayed for the following relief:

1. That a special three-judge court be called to hear and determine this case as provided by 28 U. S. C. A., Section 2281, and declare the rights of Appellant pursuant to 28 U. S. C. A., Section 2201.

2. That Act No. 502 be declared void for violation of the *Fourteenth Amendment of the Constitution of the United States of America* and of Section 211, *Constitution of Alabama* (1901).

3. That Appellee and his successors in office would deprive the plaintiff and all others similarly situated of property without due process of law acting under Act No. 502.

4. That the Appellee and his predecessors in office have, under color of statute and by custom in the past,

deprived the Appellant and all other taxpayers similarly situated of the equal protection of the law and of property without due process of law.

5. Declare that the Appellant and all other citizens and taxpayers similarly situated do not have a plain, speedy and efficient remedy in the State Courts of Alabama.

6. That the Appellee and his successors in office be enjoined from continuing, under color of statute and by custom, from depriving the Appellant and others similarly situated of property without due process of law by failing, refusing or neglecting to perform the statutory duties of that office, further be compelled to require that all real estate be assessed equally for the purpose of ad valorem taxes at 30 percent of fair and reasonable market value.

7. For the United States District Court to retain jurisdiction of this case to enforce compliance of the *Constitution of the United States of America* and *Constitution of Alabama* and to enter such other orders as may be necessary to accomplish such.

8. For such other relief as may be proper and just.
A three-judge court was convened as prayed.

Appellant's initial pleading was a Motion to Dismiss addressed to the jurisdiction of the United States District Court to entertain this case. This motion was denied by a unanimous order entered on November 14, 1967.

Thereafter, Appellant filed Request for Admissions and Interrogatories to the Appellee. Appellee filed his answers and admissions. Appellee then filed a Motion for Summary Judgment which again addressed itself solely to the jurisdiction of the United States District Court. Appellee also filed an Answer. Based upon the admissions in Appellee's Answer, the admissions of the Appellee in

response to the Request for Admissions and the evidence and admissions in Appellee's answers to interrogatories, Appellant then filed a Motion for Summary Judgment and accompanied said motion with the transcript of the evidence in the case of *L. & N. Railroad* v. *State of Alabama,* which sworn testimony had been given in the Circuit Court of Montgomery, Alabama and the witnesses subjected to cross-examination by the attorney for the State of Alabama, the same attorney representing the Appellee in this instant case.

In an apparent reconsideration of the Motion to Dismiss of the Appellee, a two-judge majority opinion on April 10, 1968 entered an order dismissing this case. The Honorable Frank M. Johnson, Jr., United States District Judge, filed a written dissenting opinion.

QUESTIONS PRESENTED ARE SUBSTANTIAL

The primary issue involved in this appeal has never been decided by the United States Supreme Court and the various Circuits of the United States Courts of Appeals are divided in their treatment of this matter. *Gray* v. *Morgan,* 371 F. 2d 172 (7th Cir. 1966); *Ream* v. *Handley,* 359 F. 2d 728 (7th Cir. 1966); *Howard* v. *Higgins,* 379 F. 2d 227 (10th Cir. 1967), and *Fuller* v. *Folk,* 351 F. 2d 323 (3rd Cir. 1965), are some recent expressions supporting the majority opinion in the present case, and to the effect that Federal jurisdiction does not arise under 28 U. S. C. A. 1343(3) for the protection of property taken without due process of law contrary to the protection of the *Fourteenth Amendment of the Constitution of the United States of America.* Under this construction, the United States District Courts would not have jurisdiction of such a constitutional claim unless the jurisdictional requirement of TEN THOUSAND AND NO/100 ($10,000.00) DOLLARS

in controversy is alleged under the provisions of 28 U. S. C. A., Sections 1331 and 1332. These opinions are primarily based upon the concurring opinion of Mr. Justice Stone in the decision of *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939).

Other decisions hold that 28 U. S. C. A. 1343(3) means exactly what it says. These decisions either state that the provisions of this statute authorize no meaningful distinction between "property rights" and "civil rights" secured by the *Constitution of the United States of America*, or simply ignore any such distinction and apply 28 U. S. C. A. 1343(3) in cases where only a property right is in litigation. Examples of such are:

Glicker v. *Michigan Liquor Control Commission*, 160 F. 2d 96 (6th Cir. 1947).

Burt v. *County of New York*, 156 F. 2d 791 (2nd Cir. 1946).

Cobb v. *City of Malden*, 202 F. 2d 701 (1st Cir. 1953).

The Fifth Circuit is itself badly divided on this issue. In the case of *Bussie* v. *Long*, 383 F. 2d 766, the court accepted the viewpoint adopted by the majority in the instant case. However, in the cases of *Hornsby* v. *Allen*, 326 F. 2d 605 (1964), *McGuire* v. *Sadler*, 337 F. 2d 902 (1964), *Mansell* v. *Saunders*, 372 F. 2d 573 (1967), and *Atlanta Bowling Center, Inc.* v. *Ivan Allen*, ... F. 2d ..... (February 13, 1968), the view asserted by this Appellant has been followed. It is therefore apparent that the issue presented by this appeal is important to bring some measure of conformity in the practice in the various Circuits of the United States Courts of Appeals.

Additionally, as stated in the dissenting opinion in this case, the majority of the District Court judicially determined that Alabama's statutory procedure for taxation, regardless of how inadequate or illegal, is not subject to the minimal demands of the *Fourteenth Amendment to the Constitution of the United States of America.* This decision was rendered even though it was alleged that the Appellant was without a plain, speedy and efficient remedy in the state courts of Alabama. As such, it is respectfully submitted that this decision constitutes dangerous precedent.

Respectfully submitted,

BARRY HESS
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Attorney for Appellant

.....
BARRY HESS

CERTIFICATE OF SERVICE

I hereby certify that I have on this ..... day of ....., 1968, served a copy of the foregoing Jurisdictional Statement upon the Honorable Willard W. Livingston, Assistant Attorney General for the State of Alabama and attorney of record for Appellee in this case, by mailing same, properly addressed, first class postage prepaid to his offices in Montgomery, Alabama.

BARRY HESS
Attorney for Appellant

.....
BARRY HESS

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

MARTHA A. HORNBEAK, for herself and for all others similarly situated, Plaintiff,

vs.

PHILLIP HAMM, Commissioner of Revenue for the State of Alabama, and his successors in office, Defendant.

Civil Action No. 2608-N

(Filed April 10, 1968. By R. C. Dobson, Clerk)

Before GODBOLD, Circuit Judge, and JOHNSON and PITTMAN, District Judges.

GODBOLD, Circuit Judge:

The plaintiff, as the owner of real estate in Alabama and as a citizen and taxpayer, brings this suit in an effort to require uniform assessment of property throughout the State of Alabama for ad valorem tax purposes.

I

Uniformity of assessment is required by § 211 of the Alabama Constitution[1] and by the Alabama statutes.[2]

1. "All taxes levied on property in this state shall be assessed in exact proportion to the value of such property. . . ."

2. Ala. Code Tit. 51, § 17 (Supp. 1965): "All taxable property within this state shall be assessed for the purpose of taxation at sixty percent of its fair and reasonable market value. . . ."

The plaintiff alleges a cause of action under 42 U.S.C.A. §§ 1983 and 1988,[3] alleging the lack of uniformity of valuation and assessment of property deprives her and others similarly situated of property without due process of law and is a denial of equal protection of the laws, in violation of the 14th Amendment to the Constitution of the United States. But alleging a violation of constitutional rights is not itself sufficient to gain access to the Federal courts. Federal jurisdiction is claimed under 28 U.S.C.A. § 1343(3),[4] the civil rights jurisdictional statute, which contains no required minimum amount in controversy in the suit. If the case is one within § 1343 the jurisdictional amount provisions of 28 U.S.C.A. §§ 1331 and 1332 (more than $10,000 in controversy) need not be complied with. If there is no jurisdiction under § 1343, "federal question" jurisdiction may be claimed under § 1331, but the required jurisdictional amount would have to be present; no such claim is presently

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3. "Section 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity or other proper proceeding for redress." (R.S. Sec. 1979)

"Section 1988. Proceedings in vindication of civil rights. The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, . . ." (R.S. Sec. 722)

4. "Section 1343. Civil Rights.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:—

* * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom, or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

before us. Thus the key issue before this court is whether § 1343, a jurisdictional statute, applies. The case comes before a three-judge district court under 28 U.S.C.A. § 2281, providing that "[a]n . . . injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application thereof is heard and determined by a district court of three judges." The plaintiff attacks the constitutionality of Act No. 502, adopted by the Alabama Legislature at its 1967 regular session,[5] and seeks an injunction against the defendant, and his successors in office, "from continuing, under color of statute, . . ., [to deprive] plaintiff and all other citizens and taxpayers similarly situated, of property without due process of law. . . ."

We conclude that this case is not within § 1343, hence no basis for federal jurisdiction is shown to exist and the case must be dismissed.

II. Jurisdiction under § 1343.

The plaintiff is met at the threshold by the recent decision of the United States Court of Appeals for the Fifth Circuit in *Bussie* v. *Long*, 383 F.2d 766 (5th Cir. 1967), *affirming* 254 F. Supp. 797 (E.D. La. 1966). *Bussie* was a similar attack on non-uniform assessments in Louisiana, in which it was alleged that plaintiff was assessed at a higher percentage of value than owners of similar property, and plaintiff asked that the State Tax Com-

5. "Section 1. All taxable property within this state shall be assessed for the purpose of taxation not to exceed 30% of its fair and reasonable market value.

"Section 2. Code of Alabama, Title 51, Section 17, which conflicts with this Act, and all other laws or parts of laws in conflict herewith, are hereby repealed."

mission be ordered to determine actual cost value of all property, to fix a uniform percentage of cash value for purposes of ad valorem taxation and to carry out its statutory duty of equalizing assessments. Basically these are the same allegations and the same type of relief involved in the case before us. *Bussie* held such a suit involved only a "property or monetary right" and not a "civil right" within the purview of § 1343.

The *Bussie* ruling was based upon *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423 (1939). There was no opinion of the court as such in *Hague*. But the concurring opinion of Mr. Justice Stone considered the two jurisdictional statutes, §§ 1331 and 1343, and distinguished between them, saying: "By treating [§ 1343] as conferring federal jurisdiction of suits brought under the Act of 1871 in which the right asserted is inherently incapable of pecuniary valuation, we harmonize the two parallel provisions of the Judicial Code, construe neither as superfluous, and give to each a scope in conformity with its history and manifest purpose." *Id.* at 530, 83 L.Ed. at 1444-45. Mr. Justice Stone distinguished between *Holt* v. *Indiana Mfg. Co.*, 176 U.S. 68, 20 S.Ct. 272, 44 L.Ed. 374 (1900), a suit to restrain alleged unconstitutional taxation of patent rights, held not to involve a "civil right" under the predecessor to § 1343, and other cases[6] in which "the gist of the cause of action was not damage or injury to property, but unconstitutional infringement of a right of personal liberty not susceptible of valuation in money."

The distinction between property rights and rights of personal liberty, as related to § 1343, was made by the Seventh Circuit in *Gray* v. *Morgan*, 371 F.2d 172 (7th Cir.

6. *Truax* v. *Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915); *Crane* v. *Johnson*, 242 U.S. 339, 37 S.Ct. 176, 61 L.Ed. 348 (1917).

1966). "Thus far, at least, it is quite clear that the courts have generally treated this statute as applicable to personal liberty rather than a property or monetary claim." 371 F.2d at 175.[7]

The plaintiff does not seek refund of ad valorem taxes or relief from the valuation of her property or the assessment based thereon. She asks that the assessments of all others be brought up to the same level as that against her, 30% of fair and reasonable market value. Such action, done statewide and involving millions of dollars in taxes, is said to make her claim one inherently incapable of pecuniary valuation. But this does not convert the essential nature of the claim from property tax and fiscal to a right of personal liberty.

> [Sec. 1343], however, may be thought of as a remedy in cases where the right asserted is incapable of pecuniary valuation. Detroit Edison Co. v. East China Township School Dist., 247 F.Supp. 296 (E.D. Mich. 1965). Generally, jurisdiction under this Act cannot be invoked in a pure tax action. A mere allegation of discrimination is insufficient to invoke Civil Rights Act jurisdiction automatically. Where plaintiffs' remedies are of the sort classically associated with tax actions and the claims are of a property nature, a federal court should not accept jurisdiction solely on this basis. Cf. Olan Mills, Inc. of Tenn. v. Opelika, Alabama, 207 F.Supp. 332 (M.D.Ala.1962). Otherwise, the jurisdictional amount provisions of 28 U.S.C.A. §§ 1331 and 1332 could easily be circumvented by a mere allegation of denial of equal protection. This would be true even if the amount in controversy were readily ascertainable. Equal protection in tax actions may constitute a federal question but it does not necessarily involve a corresponding Civil Rights Act violation.

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7. See also the holding of the district court in the same case, *Gray* v. *Morgan*, 251 F.Supp. 316 (W.D. Wis. 1966): "We incline to defendant's view that 28 U.S.C., Sec. 1343 is inapplicable to the assertion of claims which are primarily fiscal."

Alterman Transp. Lines, Inc., v. *Public Serv. Comm'n*, 259 F. Supp. 486, 492 (M.D. Tenn. 1966) (3-judge court), *aff'd per curiam*, 386 U.S. 262, 87 S.Ct. ....., 18 L.Ed. 2d 39 (1967).

In recent opinions, none involving taxation, the Fifth Circuit found § 1343 jurisdiction in cases involving property rights: *Hornsby* v. *Allen*, 326 F.2d 605, *rehearing denied*, 330 F.2d 55 (5th Cir. 1964) (arbitrary denial of a city liquor license); *Mansell* v. *Saunders*, 372 F.2d 573 (5th Cir. 1967) (denial of garbage collection franchise, relying in part on *Hornsby*); *McGuire* v. *Sadler*, 337 F.2d 902 (5th Cir. 1964) (actions of Texas Land Commissioner affecting land title, relying in part on *Hornsby*). In *Bussie* the Fifth Circuit declined to apply *Hornsby*, *Mansell* and *McGuire* to a cause of action concerning tax assessments. The court pointed out that in *Hornsby* and *Mansell* the facts indicated that federal question jurisdiction [under § 1331], including necessary jurisdictional amount, probably was present, and that in *McGuire* jurisdiction under both federal question and civil rights statutes had been found present.

Other cases adhere to the "property right"—"right of personal freedom" distinction. *Abernathy* v. *Carpenter*, 208 F. Supp. 793 (W.D. Mo. 1963) (3-judge court), *aff'd mem.*, 373 U.S. 241, 83 S.Ct. 1295, 10 L.Ed. 2d 409 (1963), was a suit by nonresidents to enjoin collection of the Missouri income tax. The court held there was no § 1343 jurisdiction, discussing at length *Holt* and Mr. Justice Stone's articulation of the rule in *Hague*. This is the case which *Bussie* referred to as evidencing the Supreme Court's adherence to the *Hague* and *Holt* views.

Other cases are: *Ream* v. *Handley*, 359 F.2d 728 (7th Cir. 1966) (slander of title to real estate by state officials);[8] *Gray* v. *Morgan*, *supra* (action to declare unconstitutional and to enjoin collection of state income taxes); *Alterman Transp. Lines, Inc.*, v. *Public Serv. Comm'n*, *supra* (alleged discriminatory assessments of property of public utilities); *Booth* v. *General Dynamics Corp.*, 264 F. Supp. 465 (N.D. Ill. 1967) (class action on behalf of taxpayers within a sanitary district to block transfer of land at a grossly inadequate price); *Howard* v. *Higgins*, 379 F.2d 227 (10th Cir. 1967) (action against sheriff for deprivation of claimant's personal property in custody of sheriff); *Fuller* v. *Volk*, 351 F.2d 323 (3d Cir. 1965) (class action by taxpayers to enjoin allegedly unconstitutional use of public funds).[9]

Cases tending to ignore the "civil rights"—"property right" distinction are: *Glicker* v. *Michigan Liquor Control Comm'n*, 160 F.2d 96 (6th Cir. 1947) (revocation of a liquor license on grounds of political discrimination); *Burt* v. *City of New York*, 156 F.2d 791 (2d Cir. 1946) (imposition of unlawful conditions on one architect not imposed on other architects); *Cobb* v. *City of Malden*, 202 F.2d 701 (1st Cir. 1953), (conspiracy of officials to deprive teachers of constitutional rights by employing state law to abrogate contract obligations).

This district court does not sit to review the correctness of *McGuire*, *Hornsby* and *Mansell*, or of *Bussie*.

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8. This case declined to follow *Joe Louis Milk Co.* v. *Hershey*, 243 F. Supp. 351 (N.D. Ill. 1965). *Louis*, citing *McGuire* and *Hornsby*, had taken what it termed a "more latitudinarian view" that § 1343 is not limited to "civil rights" or "human rights." The *Ream* court declined to ignore *Hague*, *Holt*, and *Abernathy*.

9. See also *Walton* v. *City of Atlanta*, 181 F.2d 693 (5th Cir. 1950), in which the Fifth Circuit recognized the lack of jurisdiction if property rights were involved and found that the right of plaintiffs to earn a livelihood was not a property right.

All are Fifth Circuit decisions. Nor may we characterize them as representing differing views between which we choose, for that choice already has been made—*Bussie* explicitly holds the three earlier cases do not apply to a cause of action involving tax assessments.

The plaintiff seeks to avoid the impact of *Bussie* on the ground she attacks the constitutionality of Act No. 502, while in *Bussie* there was no claim that any Louisiana statute was unconstitutional. That has to do with whether the case is one for a single judge or for a three-judge district court under § 2281 and does not relate to whether a cause of action is stated under § 1343. Alternatively the plaintiff seeks to escape *Bussie* on the ground that the court there found there was an adequate remedy in state courts while, it is claimed, there is no adequate remedy in the Alabama state courts. This argument goes to whether a federal court having jurisdiction should refrain from exercising it because of 28 U.S.C.A. § 1341.[10] Lack of adequate state remedy does not confer federal jurisdiction where there is none.

Hillsborough Township v. *Cromwell*, 326 U.S. 620, 66 S.Ct. 445, 90 L.Ed. 358 (1945) does not direct a different result from the one we reach. In that case federal jurisdiction arose from diversity of citizenship. Section 1343 was not in the case. *Hillsborough* refers to protection of the individual by the equal protection clause from state action discriminating against him by subjecting him to taxes not imposed on others of the same class. Clearly, such a "right to equal treatment," *id.* at 623, raises a federal question recognizable under § 1331, but existence of an

10. "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

equal protection question does not supply federal jurisdiction under § 1343. Not every claim of constitutional violation is a "civil right" under the statutes. The complaint in this case avers a denial by the defendants of due process and equal protection under the 14th Amendment. However, since we hold the complaint alleges only a "property right" and not a "civil right" under § 1343 the complaint fails to allege any basis for federal jurisdiction since it does not aver the jurisdictional amount of $10,000 or more under § 1331. Therefore, we do not reach the merits of the issue of whether the Alabama procedures attacked by the complaint in fact do or do not violate the 14th Amendment.

III. Class action and aggregation

The plaintiff alleges that she sues on behalf of all persons similarly situated. What persons would properly constitute such a class we do not reach. We do not consider the motions of plaintiff and of defendant for summary judgment.

It is, therefore, ORDERED, ADJUDGED and DECREED that the case is DISMISSED. It is further ORDERED that the costs are taxed against the plaintiff. Plaintiff is given thirty days in which to amend if she so desires.

DONE this the 9th day of April, 1968.

/s/ John C. Godbold
United States Circuit Judge

.....
United States District Judge

/s/ Virgil Pittman
United States District Judge

MARTHA A. HORNBEAK, ETC. VS.
PHILLIP HAMM, ETC.
CIVIL ACTION NO. 2608-N

(Filed April 10, 1968. By R. C. Dobson, Clerk)

JOHNSON, District Judge, dissenting:

In what appears to be a reconsideration of the motion to dismiss filed by the defendant in this case—which motion was denied on November 14, 1967, by an order of this Court signed by all three judges constituting the Court—the majority of the Court now determines that there is no federal question jurisdiction and orders the case dismissed. I am of the firm opinion, as I was at the time I signed the order denying the motion to dismiss, that the plaintiff states a cause of action cognizable under the jurisdictional statute, 28 U.S.C. § 1343(3).

The substance of plaintiff's constitutional claim is that the defendant Commissioner of Revenue for the State of Alabama and his predecessors in office have abridged, and the defendant and his successors in office will continue, unless prevented by this Court, to abridge, the privileges and immunities of the plaintiff and all other citizens of the State of Alabama similarly situated by continuing to refuse to perform, or neglecting to perform, the duties of the office of the Commissioner of Revenue for the State of Alabama. In testing a complaint against a motion to dismiss, the allegations of the complaint and the reasonable inferences to be drawn therefrom must be assumed to be true. *Cooper Pate*, 378 U.S. 546. Thus we find here that Martha Hornbeak, the plaintiff and the owner of real estate located in Jefferson County, Alabama, has her real estate assessed for purposes of ad valorem taxation at 30 percent of its fair and reasonable market value; that the

defendant Commissioner of Revenue has the power and duty to maintain equalization of the valuation of real property throughout the State of Alabama for the purposes of assessment for ad valorem taxation; that the defendant Commissioner of Revenue and his predecessors in office have for many years failed, refused or neglected to perform the statutory duties provided by §§ 131 and 133, Title 51, Code of Alabama, pertaining to the supervision and control of the valuation, equalization and assessment of property taxes; that the average assessment of real estate for ad valorem taxation within the State of Alabama is approximately 15.4 percent of the fair and reasonable market value. The plaintiff says that, by reason of the lack of uniformity in the valuation and assessment of real property by the defendant, she and others similarly situated are deprived of property without due process of law and are also denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States. Plaintiff further alleges, and again we must at this point accept as true, that she has no adequate state remedy. To me, such allegations constitute a cause of action under 42 U.S.C. §§ 1983 and 1988 and are, therefore, cognizable under the federal jurisdictional statute, 28 U.S.C. § 1343(3).

The majority of this Court rests the dismissal of this case upon *Bussie* v. *Long*, 383 F. 2d 766 (5th Cir. 1967), which holds that an action such as plaintiff now seeks to prosecute involves only a property or monetary right and not a "civil right" within the meaning of § 1343. As I have repeatedly demonstrated throughout the years, I am a strong adherent of the philosophy that district judges are obligated to follow the opinions and rulings of the higher federal courts, e.g., *Alabama NAACP, et al.* v. *Lurleen Burns Wallace and John W. Gardner, as Secretary*, 269 F. Supp. 346. However, where, as here, we—sitting as a dis-

trict court—are confronted with decisions from our Fifth Circuit Court of Appeals that are directly conflicting, I know of no authority that says we must follow a particular case, to-wit, *Bussie* v. *Long*, 383 F. 2d 766. I would think a more judicious approach would be to follow the better reasoned authority, or where, as here, we have at least four Fifth Circuit cases contrary to *Bussie*, the preponderance of authority. In *Hornsby* v. *Allen*, 326 F. 2d 605, 1964, the Fifth Circuit Court of Appeals specifically held that state licensing of activities is subject to the minimal demands of the Fourteenth Amendment's due process and equal protection requirements and for that reason an action alleging arbitrary denial of a state license—strictly involving "property"—was cognizable as a "civil right" under the federal jurisdictional statute, 28 U.S.C. § 1343-(3). No jurisdictional amount was alleged or even mentioned in *Hornsby*. Again in 1964 the Fifth Circuit Court of Appeals in *McGuire* v. *Sadler*, 337 F. 2d 902, held that an action alleging deprivation of "property rights" by a state was cognizable as a "civil right" within the meaning of §§ 1983 and 1988 and such an action vested jurisdiction in the district court under 28 U.S.C. § 1343(3). This same conclusion was reached by the Fifth Circuit in 1967 in *Mansell* v. *Saunders*, 372 F. 2d 573. Furthermore, it appears that *Hornsby*, *McGuire* and *Mansell* have been recently revitalized by the Fifth Circuit in *Atlanta Bowling Center, Inc., etc.* v. *Ivan Allen, Jr., Mayor, etc.*, February 13, 1968, ... F. 2d ..... In the *Atlanta Bowling Center* case, Judge Brown, speaking for the Court, discusses *Hornsby* and *Bussie*. In *Atlanta Bowling Center*, it was contended that the Atlanta Licensing Board violated due process when it arbitrarily denied a license—a "property right"—on a basis not promulgated in the Atlanta ordinance and, further, that the Licensing Board denied the Bowling Center equal protection by granting a license to others while denying a license to the Bowling Center. The

district court dismissed the action—as the majority of this Court dismisses Mrs. Hornbeak's action—"without prejudice" for a lack of federal jurisdiction. The Fifth Circuit in its February 13, 1968 order, even though the appellants were denied relief, decided the case on the merits of the controversy. It is basic that a court cannot decide a case on its merits without first determining that it has jurisdiction to decide the case. Thus, the Fifth Circuit in *Atlanta Bowling Center, Inc., et al.* v. *Ivan Allen, Jr., etc., et al.*, necessarily found jurisdiction under §§ 1983 and 1343(3), in another "property rights" case since the merits were reached and the action was dismissed with prejudice after doing so. It appears, therefore, that not only the preponderance of the authority in the Fifth Circuit but the more persuasive and even the most recent Fifth Circuit authority is contrary to the action taken by the majority of this Court in dismissing Mrs. Hornbeak's action.

In dismissing this case, the majority of this Court is judicially determining that Alabama's statutory procedure for taxation, regardless of how inequitable or illegal,[1] is not subject to the minimal demands of the Fourteenth Amendment to the Constitution of the United States. I simply do not believe this to be the law of this country. It is my firm conviction that such arbitrariness on the part of the State authorities (and upon the present submission it is conceded that the plaintiff has no State remedy) in the assessment of real estate for purposes of taxation by the State of Alabama is, if the appropriate complaint and alle-

1. Act No. 502, which is under consideration here, legalizes the assessment of property for ad valorem taxation at "anything up to 30 percent." This means anything from one percent (1%) to thirty percent (30%) without any rational basis is authorized by this Act of the Alabama Legislature as a basis for taxing property. While it is not before us at this time, Senate Bill No. 56, which became Act No. 502—the Act plaintiff is attacking in this case—originated in the Alabama Senate. The Act is clearly unconstitutional by reason of § 70, Article 4, Constitution of Alabama, which requires that all bills for the raising of revenue originate in the House of Representatives.

gations are made under 42 U.S.C.A. § 1983, cognizable in a federal district court as a "civil action for deprivation of rights" and jurisdiction exists under 28 U.S.C.A. § 1343(3) "to redress the deprivation."

The majority, in order to attempt to sustain its action of dismissal, after citing the cases from the Seventh, Tenth and Third Circuits[2] that support the dismissal and recognizing the contrary authority of the Sixth, Second and First Circuits,[3] and after refusing to follow *McGuire, Hornsby* and *Mansell* and ignoring the February 13, 1968, case of *Atlanta Bowling Center, Inc.* v. *Ivan Allen, Jr., supra*—all of the Fifth Circuit—elects to follow the lone Fifth Circuit case of *Bussie*. The attempt to distinguish *Bussie* from these cases with the statement that the "choice has been made" for this Court by *Bussie* is completely specious. Even the Fifth Circuit in *Bussie* recognized "there is admittedly a fine line between these cases and the instant case." Since all these cases—*Hornsby, Mansell, McGuire, Atlanta Bowling Center* and *Bussie*—involve nothing more or less than property rights, there simply is no valid distinction which will justify the majority of this Court concluding, solely upon the basis of *Bussie*, that jurisdiction does not now exist in the case before us.

With deference, I dissent.

This, the 9th day of April, 1968.

/s/ Frank M. Johnson, Jr.
United States District Judge

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2. *Gray* v. *Morgan*, 371 F. 2d 172 (7th Cir. 1966); *Ream* v. *Handley*, 359 F. 2d 728 (7th Cir. 1966); *Howard* v. *Higgins*, 379 F. 2d 227 (10th Cir. 1967); *Fuller* v. *Volk*, 351 F. 2d 323 (3d Cir. 1965).

3. *Glicker* v. *Michigan Liquor Control Comm'n.*, 160 F. 2d 96 (6th Cir. 1947); *Burt* v. *City of New York*, 156 F. 2d 791 (2d Cir. 1946); *Cobb* v. *City of Malden*, 202 F. 2d 701 (1st Cir. 1953).

Alabama Code

Tit. 51, § 131, Department of Revenue:

§ 131. **Powers and duties of department.**—It shall be the duty of the department of revenue, and it shall have the power and authority, in addition to the authority now in it vested by law. (a) To have and exercise general and complete supervision and control of the valuation, equalization and assessment of property, privilege, or franchise, and of the collection of all property, privilege, license, excise, intangible, franchise or other taxes, for the state and counties, and of the enforcement of the tax laws of the state, and of the several county tax assessors, and county tax collectors, probate judges, and each and every state and county official, board or commission charged with any duty in the enforcement of tax laws, to the end that all taxable property in the state shall be assessed and taxes shall be imposed and collected thereon in compliance with the law, and that all assessments on property, privileges, intangible, and franchises in the state shall be made in exact proportion to the fair and reasonable market value thereof in substantial compliance with the law. (b) To equalize, value and assess or cause to be equalized, valued and assessed, any property subject to taxation, and such valuations and assessments it shall enter or cause to be entered in the proper assessment book, or record, or minutes of the proper official, board or tribunal; to set aside all assessments so entered in any assessment book, record or minutes within any time before the end of the assessment year, and after ten days' notice given the taxpayer which notice shall be given by registered mail, return receipt demanded, of the time and place of hearing, revalue and reassess said property and cause such revaluation and reassessment to be entered in the proper assessment book record or minutes in lieu of the original valua-

tion and assessment, provided, that no reassessment or revaluation shall be made of any particular assessment from which an appeal is then pending, or if the valuation of the property for that year has been fixed on appeal by the circuit court or supreme court; provided further that parties may appeal from such revelation and reassessment to the circuit court within like time and in like manner as from the valuation and assessment as fixed by the board of equalization. (c) To confer with, advise and direct the several county tax assessors, county tax collectors, probate judges, boards or commissions, and each and every state and county official charged with the assessment and collection of taxes, as to their duties under the laws of this state. (d) To direct suits to be instituted by the attorney general, circuit or deputy solicitors, or attorneys especially employed for such purposes, with the approval of the attorney general for the collection of any taxes or penalties due the state of any county, or to compel any officer or taxpayer to comply with the provisions of the tax laws; to direct actions, prosecutions and proceedings to be instituted to enforce the laws of this state relating to taxes, penalties, forfeitures and liabilities, and for the punishment of any public officers or any person or any officer or agent of any corporation, company or association, trustee or receiver for failure or neglect to comply with the provisions of the tax laws, and to cause complaints, informations, actions or prosecutions to be made or instituted against any tax assessor, tax collector, probate judge, or other public official, for the removal of such officers for official misconduct or neglect of duty. (e) To require circuit or deputy solicitors, and the attorney general of the state, to commence and prosecute, within the respective jurisdictions or spheres of official duty of said officers, actions, proceedings and prosecutions for penalties, forfeitures, impeachments, and punishments for violations of the tax laws of the

state. (f) To require any public official in the state to report information as to valuation, equalization and assessment of property, privileges, franchises or intangible, gross receipts, collections of taxes, receipts from licenses and other sources, methods of taxation, values or franchises or intangible property or assets subject to taxation, and such other information as may be needful in the work of the department of revenue in such forms and upon such blanks as the department may prescribe and furnish. (g) To require individuals, partnerships, associations, corporations, trustees and receivers, and the agents, officers and employees thereof, to furnish information concerning their capital, funded or otherwise, gross receipts, net profits or income, excess profits, current assets and liabilities, values of franchises, intangibles, value of property, earnings, operating and other expenses, bonds, deeds, conduct of business, and all other facts, records, books, papers, documents and other information of any kind demanded which may be needful, in order to enable the department to ascertain the value and relative burden to be borne by every kind of property in this state, and to ascertain the proper amount of license, privilege, excise, corporation, franchise, income or ad valorem taxes. (h) To summon witnesses to appear and give testimony, and to procure records, books, papers, documents, and all other information of any kind or character required relating to any matter which the department shall have authority to investigate and determine. The witnesses may be summoned by subpoena issued by the commissioner, or by the secretary thereof, in the name of the department, directed to any sheriff of Alabama, and returnable to the department, which subpoena may be served in like manner as subpoenas issued out of any circuit court; or the subpoenas may be served by registered mail, addressed to the witness with return receipt demanded. In either case the subpoenas must be served at least five days previous to the time

named therein for the appearance of the witness. Subpoenas duces tecum to any witness to appear and produce any records, books, papers or other documents, may be issued and served in like manner; provided that no officer of any bank or banking institution shall be required to disclose to the department or any of its agents or clerks the deposits of its customers except upon order of court. When any witness has been summoned and refuses or fails to appear or upon appearing refuses to testify, or having been summoned to produce records, books, papers, documents, or other like information, fails or refuses to do so, either or all, shall be guilty of contempt and upon the certificate of such fact to a circuit judge he shall sentence the offender for contempt and shall punish such offender as is now provided for by law in cases of contempt in circuit courts. The department of revenue in cases of refusal to produce such books, documents, records and papers or information of such character as it may deem necessary may apply for mandamus to a judge of the circuit court of the county in which such person has his principal place of business and thereupon it shall be the duty of such circuit judge to require the production of such books, records, papers, documents and such other information as may be required, within ten days from the application of such writ of mandamus. (i) To cause the deposition of witnesses residing within or without the state to be taken upon such notice to the interested party, if any, as the department may prescribe, in like manner as depositions of witnesses are taken in actions pending in circuit court, in any matter which the department has authority to investigate and determine. The depositions shall be taken upon a commission issued by the department of revenue, or the secretary thereof, in the name of the department, and returnable to the department. (j) To visit, by the commissioner or by duly authorized agents, the several counties in the state for the

purpose of investigating the work and methods of county tax assessors, tax collectors, probate judge, or other officers or boards charged with the duty of administering the tax laws of the state; to examine carefully into all cases where evasions or violations of the tax laws are alleged, complained of or discovered, and to ascertain wherein existing laws are defective, or are improperly or negligently administered; and to report the result of the investigation and the facts ascertained to the governor from time to time when required by him. (k) To investigate the tax system of other states; to thoroughly inform itself upon the subject of taxation and of the progress made in other states and counties in improving their tax system, to formulate and recommend such legislation as may be deemed expedient to prevent evasion of existing tax laws and to secure just and equal taxation and improvements in the system of taxation in this state. (l) To consult and confer with the governor upon the subject of taxation and the administration of the laws, and progress of the work of the department, and to furnish to the governor from time to time such information as he may require. (m) To transmit to the governor, thirty days before the meeting of the legislature, a written report showing all the taxable property in the state and the value of the same, in tabulated form, with recommendations for improvements in the system of taxation in the state, together with suggestions of such measures as the department may formulate for the consideration of the legislature in regard thereto. (n) For good reason shown and entered on the minutes of the department, to extend the time for filing any report or written statement required to be filed with the department of revenue. (o) To inspect and examine at all reasonable business hours any books, documents, records or papers kept by any person, firm, corporation, trustee or receiver. (p) To make all assessments of

taxes or penalties which it is authorized to enforce or collect and report the same to the attorney general. (q) To issue executions and writs of garnishment directed to any sheriff of Alabama, on any final assessment or judgment made or rendered by it, and upon such executions the sheriff shall proceed as in cases issued out of the circuit court and shall make return thereof to the department of revenue within sixty days after the receipt thereof. (r) To perform such other duties as are or may be imposed on it by law. (Ib.)

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§ 133. **Equalization of valuation.**—It shall be the duty of the department of revenue to examine such of the tax records of the several counties as will enable it to ascertain whether the tax valuation of the various classes of property as made in the respective counties of the state, is reasonably uniform as between the respective counties, and is in proportion to the fair and reasonable market value of the property assessed. The purpose and intent of this title is to bring about as far as practicable an equalization throughout the state of the value of the various classes of property subject to taxation, so that the proportion of the fair and reasonable market value of the property as fixed for assessment in one county shall be in due proportion to the fair and reasonable market value of the same classes of property in other counties, fixed on the same basis for assessment, and that such classes of property in every county shall bear their proportion of the tax provided by law. If it shall appear to the said department of revenue that in any one or more counties of this state, or in any municipality or precinct of any county, the taxable values upon any one or more classes of property are not reasonably uniform with the values fixed upon the same classes of property in other counties, or are not in proportion to the fair and reason-

able market value of such property, the department of revenue shall investigate and inquire as to the reason therefor, and after making such investigation and comparison, shall have authority to order and direct the board of equalization to readjust and reequalize the same for the current or succeeding tax year, so that each item of property will bear its just proportion of the taxes as provided for herein. And the department of revenue shall thereupon notify the secretary of the board of equalization of the county affected, and the comptroller, that the county, precinct or municipal valuations upon the classes of property specified in said notice will be readjusted as provided herein, and the comptroller shall thereupon return to said county its tax abstract and other tax returns for correction accordingly. (Ib).

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